

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

Kemp; Taylor,
Appellee and Cross-Appellant,

v.

Kemp,
Appellant and Cross-Appellee.

JUDGES;
Hon. John B. Boggins, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 04CA011

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Coshocton County Court of
Common Pleas, Case No. 02CI222

JUDGMENT:

Reversed in part and Remanded

DATE OF JUDGMENT ENTRY:

June 17, 2005

APPEARANCES:

William C. Hayes, for appellee and cross-appellant.

Thomas W. Fox, for appellant and cross-appellee.

HOFFMAN, Judge.

{¶ 1} Appellant and cross-appellee, Doris Pauline Kemp, appeals from the April 21, 2004 judgment entry of the Coshocton County Court of Common Pleas in favor of appellee and cross-appellant, Ronald Taylor. Taylor cross-appeals from that portion of the judgment entry in favor of Kemp.

STATEMENT OF THE FACTS AND CASE

{¶ 2} Prior to their marriage on September 28, 1992, Ralph E. Kemp and Doris Kemp executed a prenuptial agreement on July 10, 1992. No children were born of the marriage, but Ralph had a stepson, Ronald Taylor, from a previous marriage.

{¶ 3} On September 22, 2000, Ralph, who was in poor health, executed a power of attorney, giving Doris the authority to act on his behalf. On September 26, 2000, Doris used the power of attorney to close three bank accounts titled in Ralph's name, which held a total of approximately \$82,000. She deposited the money in a separate bank account solely in her name.

{¶ 4} Ralph died on September 26, 2000. However, prior to his death and prior to executing the power of attorney, Ralph established or changed the beneficiary designations on several payable-on-death bank accounts, making Doris the beneficiary.

{¶ 5} On October 2, 2000, Doris applied to the probate court to be appointed as administrator of Ralph's estate, alleging that Ralph had died intestate. Doris did not inform the probate court of the premarital agreement, nor did she report the \$82,000 that she had taken from Ralph's bank accounts on September 26, 2000.

{¶ 6} On February 11, 2001, Taylor filed a motion to remove Doris as administrator and to appoint a successor. On April 16, 2001, the court removed Doris as administrator and appointed attorney Timothy France. On August 24, 2001, Taylor applied to probate a lost, spoliated, or destroyed will. On February 28, 2002, a copy of a 1956 will of Ralph Kemp was admitted to probate. The 1956 will named Ralph's first wife, Ethel, as his sole heir and Taylor as the sole contingent beneficiary. As a result, Taylor was appointed executor of Ralph Kemp's estate on March 25, 2002.

{¶ 7} On March 28, 2002, Taylor filed a statutory action pursuant to R.C. 2109.50 against Doris. On July 25, 2002, the probate court entered judgment on the petition, ordering that the \$82,000 withdrawn by Doris be returned to the estate. The probate court denied Taylor's remaining requests for recovery, including \$229,000 from the payable-on-death accounts.

{¶ 8} On May 3, 2002, Taylor, individually, and Floyd Kemp filed a civil action in the court of common pleas seeking damages caused by Doris as a result of fraud, fraudulent conveyance, conversion, and intentional interference with the expectancy of inheritance. On February 10, 2003, they amended their complaint, adding Karma Miller and Allen Bickel as defendants. On November 17, 2003, Floyd Kemp voluntarily dismissed his claims against all parties, leaving Taylor as the sole plaintiff.

{¶ 9} On January 16, 2004, and January 22, 2004, the matter proceeded to a bench trial. On April 21, 2004, the trial court granted judgment in favor of Taylor against Doris in the amount of \$270,000 and dismissed the complaint as to Bickel and Miller. The trial court further denied Taylor's demand for punitive damages and attorney's fees. On July 23, 2004, the trial court entered findings of fact and conclusions of law, which both parties stipulated to being transmitted to this court for inclusion in the appellate record.

{¶ 10} It is from the April 21, 2004 judgment entry of the Coshocton County Court of Common Pleas that both parties now appeal.

{¶ 11} Appellant and cross-appellee, Doris, assigns as error:

{¶ 12} "1. The trial court committed prejudicial error when it permitted hearsay testimony about Ralph Kemp's 'probate avoidance and tax avoidance plan.'"

{¶ 13} “II. The trial court’s conclusion that Doris Kemp’s breach of promise related to the [payable-on-death] bank accounts is not supported by the evidence.”

{¶ 14} “III. The trial court’s conclusion that Doris Kemp committed fraud by her promise of future conduct regarding the [payable-on-death] accounts is error as a matter of law.”

{¶ 15} “IV. The trial court’s conclusion that Ronald Taylor had a reasonably certain expectation of ‘inheritance’ as it relates to the \$229,000 in [payable-on-death] accounts is not supported by the evidence.”

{¶ 16} “V. The trial court’s conclusion that the plaintiff can recover non-probate assets by demonstrating the tort of ‘intentional interference with expectancy of inheritance’ is error as a matter of law.”

Assignment of Error No. I

{¶ 17} In the first assignment of error, Doris maintains that the trial court committed prejudicial error when it permitted attorney Paul Miller’s hearsay testimony concerning Ralph Kemp’s “probate avoidance and tax avoidance plan.”

{¶ 18} Doris cites the following exchange at trial during examination of attorney Paul Miller:

{¶ 19} “Q. Did you participate in the implementation of the probate avoidance and tax avoidance plan in any respects with regard to the Belmont County real estate?”

{¶ 20} “A. Yes. That was then a second item of discussion.

{¶ 21} “Q. All right. And what was the plan there? Was it any different from the plan with Nellie, or was it the same?”

{¶ 22} “A. No, that was very different in that that property - he wanted that property to eventually -

{¶ 23} “MR. WRIGHT: Object.

{¶ 24} “THE COURT: What is the basis for your objection Mr. Wright?

{¶ 25} “MR. WRIGHT: Hearsay. I think the court’s ruled and this would go back to the testimony of any statements made by the decedent.

{¶ 26} “THE COURT: The question was: ‘Did he express an intent as to what he wanted done with the Belmont property?’ The witness may testify as to what he heard. The objection is overruled. You may answer.

{¶ 27} “A. He wanted the Belmont property to go to his stepson, Ron Taylor, whom I had never met before but I saw his name in the will.

{¶ 28} “Q. And that understanding was based on the conversations you had with him and directives that you had received from him?

{¶ 29} “A. That’s true.

{¶ 30} “* * *

{¶ 31} “Q. Were there any discussions in your presence about the plan with the Belmont County property and the ultimate beneficiary and what was to happen as far as the transfer of the property?

{¶ 32} “A. Yes, we did discuss that and - -

{¶ 33} “Q. - - I would caution you not to say what Mr. Kemp said but what your understanding of the arrangement was to be as far as transfer.

{¶ 34} “A. My understanding was that the property was jointly titled with the specific understanding that at some time in the future if Pauline Kemp survives him, that it would be surveyed and transferred to Ronald Taylor, the stepson.

{¶ 35} “Q. To what extent did you hear any discussions between Mr. and Mrs. Kemp regarding this arrangement, and I’m interested in any comments Mrs. Kemp might have made to Mr. Kemp in that setting.

{¶ 36} “A. I was reluctant with this option that they chose, and we had extensive discussion. And Mrs. Kemp expressed no interest whatsoever in his property and also convinced me that she understood what her role would be as a fiduciary in carrying out this plan.

{¶ 37} “Q. Did she make any comments to Mr. Kemp about this plan?

{¶ 38} “A. Yes, she did.

{¶ 39} “Q. What did she say?

{¶ 40} “Q. ‘I will do whatever you ask me to do.’

{¶ 41} “Q. During this process, did Mrs. Kemp make any statements to you out of the presence of Mr. Kemp?

{¶ 42} “A. Yes, she did.

{¶ 43} “Q. And what were the circumstances there?

{¶ 44} “A. As I specifically recall, he excused himself from my conference room and went to the restroom. And it was on that occasion that I took the opportunity to talk to Mrs. Kemp about the decision he is about to make. And, at least from my perspective, I tried to emphasize the weightiness of the responsibility and to which I received affirmation, at least to my satisfaction, that she would do that.

{¶ 45} “Q. Now, then did these discussions occur, again, just in general time, the discussions about the Nellie and the Belmont County? Is this all happening at the same time?

{¶ 46} “A. Yes. Approximately the same time. See, one of the issues in the Nellie life estate was that I think there was also discussion with regard to Mrs. Kemp's estate, which was, from my perspective, always considered a separate situation. But there was discussion, as I recall, on the part of Mrs. Kemp, about transferring her assets, of which I didn't know what all the details were, but I was led to believe that it's real estate near Fender's Fish Hatchery and so forth, that she may be transferring it to her children. And if they live together in Nellie, well, at least my discussion with her with them was maybe she would be out of a home or something if he would die or whatever. And I think that's one of the reasons that we began to discuss that that should just be transferred to her outright.

{¶ 47} “Q. And, as I recall, you said those discussions were in the spring of 2000?

{¶ 48} “A. Yes, they were.

{¶ 49} “Q. And did you participate in the implementation of any probate and tax avoidance plan by assisting Mr. Kemp with any other assets?

{¶ 50} “A. No, I did not. Other than just a discussion - - I think we did discuss forms of ownership.

{¶ 51} “Q. Did you inquire as to whether you were to assist with the probate and tax avoidance plan with any other assets, like bank accounts?

{¶ 52} “A. I don't know whether I specifically asked whether he wants my services, but I was advised that there were other assets, but I did not know the extent or know the dollar amount of those or the value.

{¶ 53} “Q. In your discussion, did you advise how those assets could also be set up as nonprobate type transfers?”

{¶ 54} “A. I think we talked about that, yes.”

{¶ 55} Doris claims that Evid.R. 802, 804, and 805 support her argument that Miller’s testimony constitutes inadmissible hearsay. We disagree.

{¶ 56} Generally, the admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Therefore, we will not disturb a trial court’s evidentiary ruling unless we find that the trial court abused its discretion. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 57} Evid.R. 801(C) defines “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” When an out-of-court statement is offered without reference to its truth, it is not hearsay. *State v. Lewis* (1970), 22 Ohio St.2d 125, 132-133.

{¶ 58} We conclude that the trial court did not err in admitting Miller’s testimony. The statements at issue were not offered by Taylor to prove the truth of the matters asserted but were offered to explain the actions of Ralph Kemp. The statements were therefore not hearsay, see Evid.R. 801(C), and they were relevant, as they pertained to the actions preceding Ralph Kemp’s death. See *Williams v. Franklin Cty. Bd. of Commrs.* (2001), 145 Ohio App.3d 530.

{¶ 59} The first assignment of error is overruled.

Assignments of Error Nos. II, III, and IV

{¶ 60} Appellant's second, third, and fourth assignments of error raise common and interrelated issues; therefore, we will address the assignments together.

{¶ 61} Doris maintains that there is insufficient evidence that she breached a promise related to the payable-on-death bank accounts and that the trial court erred in finding that she had committed fraud by her promise of future conduct regarding those accounts. Therefore, Doris maintains, the conclusion that Taylor had a reasonable expectation of inheritance in the payable-on-death accounts is against the manifest weight of the evidence.

{¶ 62} We agree with Doris that there is insufficient evidence to support the trial court's conclusion that she breached a promise with regard to the payable-on-death bank accounts. We find no evidence to support the trial court's finding regarding the payable-on-death accounts, nor does Taylor point to any evidence apart from the evidence set forth supra. Ralph changed the beneficiary designations in June and July 2000. The power of attorney naming Doris was not executed until September 2000. Accordingly, Doris did not use her power of attorney to change the beneficiary designations, and there is no evidence that she otherwise fraudulently induced Ralph into making the changes relative to the payable-to-death accounts. Despite the trial court's findings of fraud due to Doris's other actions, there is no evidence of fraud with regard to the payable-to-death accounts.

{¶ 63} Accordingly, appellant's second, third, and fourth assignments of error are sustained.

Assignment of Error No. V

{¶ 64} Based upon our disposition of Doris’s second, third, and fourth assignments of error, the fifth assignment of error is overruled as moot.

{¶ 65} We now turn to Taylor’s assignments of error:

{¶ 66} “I. The trial court’s failure to award the reduction of stock value from the date of Ralph Kemp’s death to the date of delivery to Ronald Taylor as executor of the estate is error as a matter of law.”

{¶ 67} “II. The trial court’s failure to award punitive [sic] damages and attorney fees is not supported by the evidence.”

{¶ 68} “III. The trial court’s failure to find Alen Bickel and Karma Miller jointly and severally liable to plaintiff is error as a matter of law.”

Cross-Assignments of Error Nos. I and II

{¶ 69} Taylor’s first and second assignments of error raise common and interrelated issues; therefore, we will address the assignments together.

{¶ 70} Taylor maintains that the trial court erred as a matter of law in failing to award him monetary damages for the reduction in stock value from the date of Ralph Kemp’s death to the date of delivery. He further maintains that the trial court erred in failing to award him punitive damages and attorney fees.

{¶ 71} Taylor asserts that the reduction in the value of the stock due to a declining market was foreseeable and due to Doris’s fraud. He further asserts that there is clear and convincing evidence that Doris’s acts or failure to act demonstrated malice, aggravated or egregious fraud, oppression, or insult and that he has presented proof of actual damages resulting from those acts or failure to act.

{¶ 72} We will not disturb a decision of the trial court as to a determination of damages absent an abuse of discretion." *Roberts v. United States Fid. & Guar. Co.* (1996), 75 Ohio St.3d 630, 634, 665 N.E.2d 664, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Again, in order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Id.* at 219, 450 N.E.2d 1140. It is possible that, in awarding an amount of compensatory damages less than that requested by Taylor, the trial court found Taylor's claimed damages to be speculative and not supported by the evidence. The value of stock often goes up or down over time. As a result, damages based on a reduction in value because of delay are inherently speculative. Therefore, upon review of the record, we do not find that the trial court abused its discretion in its award of compensatory damages.

{¶ 73} The decision whether to award punitive damages is within the trial court's discretion and, absent an abuse of discretion, the court's ruling will be upheld. Ohio law provides that an award of punitive damages is available only upon a finding of actual malice. *Berge v. Columbus Community Cable Access* (1999), 136 Ohio App.3d 281, 316, 736 N.E.2d 517. The "actual malice" necessary for purposes of an award of punitive damages has been defined as " '(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.' " *Id.*, quoting *Preston v. Murty* (1987), 32 Ohio St.3d 334, 512 N.E.2d 1174, syllabus.

{¶ 74} In its decision, the trial court concluded that punitive damages were not warranted in this case. Upon review, we find that the trial court did not abuse its discretion in refusing to award punitive damages.

{¶ 75} Taylor's first and second assignments of error on cross-appeal are overruled.

Cross-Assignment of Error No. III

{¶ 76} In his third assignment of error, Taylor argues that the trial court erred as a matter of law in failing to find Allen Bickel and Karma Miller jointly and severally liable. Initially, we note that we cannot reweigh the evidence and must defer to the findings of the trial judge, who is best able to weigh the credibility of the evidence by viewing the witnesses and observing their demeanor.

{¶ 77} A review of the trial record indicates that Karma Miller merely assisted her mother by driving her to financial institutions. Accordingly, the trial court did not err in refusing to find Karma Miller jointly and severally liable, because the evidence does not demonstrate that she engaged in tortious activity.

{¶ 78} As to Allen Bickel, the record is again insufficient to demonstrate his involvement in tortious conduct. Again, it is for the trial court to weigh the evidence and to judge the credibility of witnesses. The trial court certainly could have deemed Bickel's testimony credible regarding his not being involved in burning Ralph's will and did not err in failing to find him jointly and severally liable.

{¶ 79} Therefore, we conclude that the trial court did not err as a matter of law in failing to find Bickel and Miller jointly and severally liable, as a review of the record demonstrates there is insufficient evidence to support such a finding.

{¶ 80} The third assignment of error on cross-appeal is overruled.

{¶ 81} The judgment entry of the Coshocton County Court of Common Pleas is reversed in part, and the cause is remanded for further proceedings in accordance with this opinion.

Judgment reversed in part
and cause remanded.

BOGGINS, P.J., and GWIN, J., concur.